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Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

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Report of the Secretary-General

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I. Introduction

1. The present report has been prepared pursuant to paragraph 5 of General Assembly resolution 62/68, in which the General Assembly invited Governments to submit comments on any future action, in particular on the form of the articles on prevention of transboundary harm from hazardous activities and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, bearing in mind the recommendations made by the Commission in that regard, including in relation to the elaboration of a convention on the basis of the draft articles, as well as on any practice in relation to the application of the articles and principles.

2. The Secretary-General, in a circular note dated 20 February 2008, drew the attention of Governments to resolution 62/68, and a reminder was sent out in March 2010. As at 30 June 2010, responses had been received from Austria, Belarus, Germany, Mexico, the Netherlands, New Zealand, Panama and Portugal.

II. Comments and observations received from Governments

Austria

3. With regard to the draft articles on the prevention of transboundary harm from hazardous activities (General Assembly resolution 62/68), Austria was of the view that it would be very useful to take into account the existing practice of States when considering the ultimate form of the draft articles. Reports on State practice would allow for a better assessment of the draft articles and could, together with the draft articles, serve as a basis for discussions in a working group established by the Sixth Committee of the General Assembly on the possibility of a convention.

4. As to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (General Assembly resolution 61/36), Austria was of the view that their current form did not allow for a similar approach. Austria preferred to postpone a decision on the ultimate form of the draft principles and to continue to monitor developments in State practice. Austria proposed that the topic be placed on the agenda of the Sixth Committee again in six years' time with a view to assessing whether any action should be taken as to the form of the draft principles.

Belarus

5. Belarus stated that the conceptual bases of the draft articles and the fundamental provisions of the principles were almost entirely reflected in its legislation. Belarus was a State party to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, the fundamental principles of which were largely mirrored by the corresponding provisions in the draft articles and principles. In this regard, it could be concluded that Belarus had established a sufficient legal framework for the implementation of the draft articles and principles.

6. With regard to the advisability of formulating an international agreement, in the view of Belarus it would be wise to proceed on the premise that transboundary harm might lead to political tension and have a significant social impact. Matters of compensation for loss might involve significant financial obligations. In this regard, it would be highly appropriate to establish a clear and predictable international legal regime in that area, based on a legally binding international agreement.

Germany

7. Germany welcomed the draft articles on the prevention of transboundary harm from hazardous activities. In principle, it supported the codification of the draft, as this could be a contribution to the further development of international environmental law. In particular, codification could create legal security and enshrine the principle of reciprocity according to which States need to take preventive steps to benefit their neighbours.

8. In the view of Germany, it must be ensured that an agreement based on the draft articles would be subsidiary to the more specific agreements already in existence (for example, the Convention on International Liability for Damage Caused by Space Objects).

9. With regard to the drawing up of a convention, Germany was of the view that the wording of some of the very broadly formulated articles should be reconsidered. For example, it remained unclear what the term "significant" was intended to mean as used in draft articles 1 to 3. While the introduction of a relevance threshold in damage assessment was wholly to be welcomed, the term used remained completely vague. Without more precise definition, codification would represent no significant progress when compared with customary law, which had been shaped by decisions on individual cases (*Trail Smelter*, *Lake Lanoux*). For that reason, an attempt should be made to reach a more precise definition to open the way to uniformity.

10. Furthermore, the broad wording of draft article 2 would require further examination in the light of the need for authorization pursuant to draft article 6. The approach laid down in draft article 6 (1), according to which all activities involving a risk required prior authorization, ran counter to German practice, according to which products could be placed on the market in principle without authorization, with control proceedings thereafter being ameliorative.

11. Germany took note of the principles on the allocation of loss, but did not see any need to comprehensively codify the regime governing environmental liability. Agreements specific to individual sectors were preferable, as they would take account of the particular features of the respective branches (oil pollution, hazardous waste, genetically modified organisms). Germany pointed to the existing United Nations Environment Programme guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, which were generally welcomed as non-binding regulations and which could make an important contribution to environmental liability law at the national level.

Mexico

12. Mexico reiterated its opinion that the best mechanism for the effective implementation of the draft articles and principles in question would be the establishment of a general and binding regime, which could be achieved in the medium term through an international convention. Once such a convention was in place, each State would be required to incorporate it into domestic law.

13. Mexico expressed the view that the two aspects of the work of the Commission on the subject should be treated together in a single legal instrument.

14. Mexico emphasized that, should the General Assembly decide to elaborate a convention on the subject, the negotiating committee established for that purpose would have to review and reformulate many of the provisions in order to include aspects that were not addressed by the Commission, such as harm to areas beyond national jurisdiction. The purpose of such a reformulation would be to ensure that the international instrument was in line with contemporary international environmental law and corresponded to the current needs of the international community.

15. Mexico also reiterated that the substance of the comments and statements it had made during the consideration of the draft articles and principles by the Commission remained valid.

Netherlands

16. The Netherlands stated that it supported the main thrust of the draft articles on the prevention of transboundary harm from hazardous activities, which by and large reflected customary international law. However, it was of the view that the Commission should make further efforts to codify and progressively develop the law in that area. In particular, further thought should be given to the elaboration of provisions on environmental impact assessments, access to information, public participation and access to justice. International developments since the completion of the work on that aspect of the topic had strengthened the conviction of the Netherlands that the draft articles did not fully reflect the state of the law.

17. The Netherlands also supported the main thrust of the draft principles on the allocation of loss. The Netherlands agreed with the underlying notion of the draft principles, namely, that the question of international liability for transboundary harm also arose in the event that a State had complied with its international obligations relating to an activity carried out under its jurisdiction or control. That was a gap in international law, and the draft principles sought to fill the gap through the provision that States should take all necessary measures to ensure the availability of prompt and adequate compensation for victims of transboundary damage caused by hazardous activities. As for the measures that needed to be taken, the Netherlands generally supported the set of procedural and substantive minimum standards identified in the draft principles, which should be incorporated into domestic law.

18. With regard to the final form of the work on the topic, the Netherlands reaffirmed its position that the form of the work on the liability aspects should not be different from that on the prevention aspects. The Netherlands did not support the differentiation between the final form of the work on the prevention aspects, which

was to take the form of a draft convention, and the final form of the work on the liability aspects, which had taken the form of draft principles. It was of the view that, at a minimum, the obligation of States to take necessary measures to ensure that prompt and adequate compensation was available for victims of transboundary damage caused by hazardous activities should be incorporated into the draft articles on prevention. It could be supplemented by guidance in the form of principles, but should itself take the form of an obligation to ensure that innocent victims of transboundary damage would not be left uncompensated.

New Zealand

19. New Zealand welcomed the adoption by the General Assembly of resolutions 61/36 and 62/68 on the prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm. The principles and articles respectively attached to those resolutions represented the culmination of extensive work by the Commission.

20. New Zealand considers that, by adopting resolutions 61/36 and 62/68 and commending the principles and articles to Governments, the General Assembly had already confirmed their status as authoritative guidance for the conduct of all States in relation to the prevention of transboundary harm and the allocation of loss in the event of such harm. New Zealand was confident that the stature and influence of the principles and articles would continue to grow as they were referred to by Member States in the conduct of their activities and their international relations and drawn on by courts and tribunals at both the domestic and the international levels. In this regard, New Zealand noted that the draft articles (in their 2001 form) were referred to by the International Court of Justice in its judgment in the case concerning *Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*).

21. In the view of New Zealand, there was at present no added benefit in attempting to transform the principles and articles into the more binding form of a convention. That would be a helpful step only if at some future time there was broad and unified support for it by Member States. New Zealand considered it best simply to acknowledge and reiterate that the articles and principles in their present form were a major contribution to the achievement of a consistent, coherent and fair international regime for transboundary harm from hazardous activities and that they would continue to grow in significance.

Panama

22. Panama stated that, as a result of its geographical situation, it served as a transit point between the Pacific and Atlantic Oceans, making it one of the most heavily used routes in the world by vessels transporting oil and gas for storage and sale at the national and international levels. Accordingly, there were increased threats to the environment and its natural resources from spillage.

23. Since Panama was a transit point for fuel, it had an extensive port infrastructure. Panama had a total fuel storage capacity of 710.1 million gallons (16.9 million barrels), of which 98.5 per cent was in the ports. Some of the port facilities were located very close to the border with Costa Rica, which meant that an

oil spill could affect sectors of that country. A spill could also occur in areas in proximity to the border with Colombia.

24. Furthermore, Panama had protected wildlife reserves in border areas or in close proximity to them. These were nature reserves, which were home to many different species of flora and fauna, divided among a variety of ecosystems, ranging from coastal to mountain. At times those ecosystems had been harmed by forest fires caused by subsistence activities.

25. Panama did not have a statistical record of environmental emergencies in the border areas, but in some areas where land access was uninterrupted, there were increased environmental risks from, for example, the transit of hazardous substances, such as oil and oil derivatives.

26. According to the precautionary principle, lack of empirical evidence relating to potential damage is not a valid reason for failing to establish the rules necessary to prevent the occurrence of harm.

27. A consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm should be based on an economic (social, environmental and financial) evaluation of the environmental damage which has occurred, with due compensation to the affected country. To that end, it was necessary to establish a baseline before and after harm occurs, in order to have available the information necessary to assess the loss resulting from any environmental harm that may occur.

28. In the view of Panama, the rules regarding the control and prevention of harm arising out of such activities should be established and agreed in writing, in advance, by the parties. Accordingly, all transboundary movement should be subject to the undertaking that the party responsible for the pollution would compensate the affected party. Thus, in the event of environmental harm in the importing or transit country, the exporting country would automatically be jointly and severally liable for the environmental harm it caused.

Portugal

29. In the view of Portugal, the adoption of the draft articles and principles by the General Assembly was a positive step towards the establishment of measures allowing for prompt and adequate compensation to victims of transboundary damage and of measures to minimize the harm and loss which could result from incidents involving hazardous activities.

30. Portugal considered that the item should be analysed in the light of the history of the topic and the purposes of the codification and progressive development of international law.

31. Liability was one of the categories of international responsibility. Although it was widely accepted that international responsibility and the obligation to make reparations for wrongful acts had a solid basis under customary norms, such was probably not the case with liability for lawful acts, which was more exceptional in nature and dependent on conventional rules. Thus, it might not be wise to advance too much in the area of liability while no definitive final action was taken on the topic of responsibility of States for international wrongful acts.

32. The prevention and liability aspects of the topic should be dealt with together in terms of their legal nature and enforceability. If the purpose of the set of draft articles dealing with prevention was to create a legal obligation on the part of States to prevent transboundary harm, it would be logical and appropriate to impose on States the legal obligation to take the measures necessary to ensure prompt and adequate compensation and to minimize the harm and loss which might result from incidents involving hazardous activities. When a State violated its obligation to take such measures, it should also incur an international responsibility.

33. If the will of the international community was, for the moment, to cast the subject in the form of principles, then the formulation of the draft articles and principles would have to better reflect their soft-law and more general character. In such a case, the structure of the principles on liability should be drafted as a true declaration of principles, not in the guise of a convention. Within the framework of that option, the draft articles on prevention would also have to be revisited in order to guarantee a coherent set of principles.

34. Portugal expressed the hope that one day it would be possible to have a single convention on international liability for injurious consequences arising out of acts not prohibited by international law with regard to which the responsibility of the State was adequately assumed and a real system of compensation due as a result of the effects of lawful activities of States was put in place.

35. For the time being, for the sake of coherence, it would be an important step to achieve a whole set of draft articles or principles on both prevention and allocation of loss.